No. 800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

[illegible] Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO, *Petitioner*

v.

National Labor Relations Board

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION

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The Board's assertion (Br. p. 7; n. 6, at p. 8), that petitioner does not contest the scope of the order on the theory that the Board erred in finding that "its picketing at the school project was secondary and thus for the objects proscribed by Section 8(b)(4)(i)(B)."

is plainly unwarranted.[1] Petitioner argued specifically that insofar as the order is designed and construed to prohibit picketing of Simpson it cannot be supported either on the theory that the picketing became secondary after Simpson's laborers were removed from the project (Pet. pp. 15-16), or on the theory that the unlawful inducement of Tripp and the statements to Gilmore infused the picketing with an illegal object (Pet. pp. 11-14). The very text and context of the statement to which the Board refers (Pet. p. 10, n. 5), show that petitioner contrasted the inducement of Tripp upon which it conceded a finding of violation of Section 8(b)(4)(i)(B) properly could be based, with the picketing of Simpson, which it contended was privileged and immune. (Cf. Pet., A-7-9). Petitioner demonstrated (Pet. pp. 11-12) that under the *Moore Dry Dock* approach the Tripp and Gilmore incidents would not have "colored all of the picketing * * * with an illegal secondary object" (Op. p. 13), and would not have resulted in an order requiring the Union "to discontinue picketing * * * so as to dissipate the effects of the illegal activity" (Op. p. 9). The power of the Board to curtail primary picketing by inferring (Op. p. 11) that picketing *of* the offending employer in compliance with the *Moore Dry Dock* standards is "not directed *at*" him (Op. p. 5), petitioner certainly does contest.

Beyond that, however, petitioner contends that even if it had avowedly picketed neutral employers, as the

[1] Indeed, petitioner's second question is predicated explicitly on the contention that "the picketing which petitioner advised Gilmore would continue * * * was lawful, not unlawful, action." (Pet. p. 19). Only by treating as uncontested its assumption that the picketing was "illegal secondary and not lawful primary activity" can the Board describe that question as "evidentiary" (Op. p. 13).

unions did in *Denver* and *Langer* (Pet. 13), the Board could not enjoin it from picketing Simpson. Three members of this Court contended in *Denver* and *Langer* that in requiring the unions to treat only the primary employer as their adversary the Board had gone too far. It seems likely that if the Board had suggested that unions were to be prohibited from picketing the employer party to a primary dispute the Board would not have gotten one vote. Yet the Board admits that that is exactly what its orders are now construed to do.

While the Board stresses that the *form* of its orders remains unchanged (Op. pp. 8, 9-10), it does not deny that their substance and effect is vastly different. Thus, it concedes (Op. p. 10, n. 9), that reservation to the offending union in *Crump* of the right to picket at the common situs, provided only it made clear that its dispute was with the primary employer, merely made "explicit what would otherwise have been implicit" in the Board's order then. By contrast, its orders now are admittedly (Op. p. 9) construed to require the Union to "discontinue [all] picketing" at least "for a reasonable period of time." The admission of the court below (Pet. p. 14) which the Board would now repudiate (Op. n. 7, p. 8), serves only to confirm that, even if this prohibition were limited in duration, it could not be imposed without disregarding "the area of Union's rights as against * * * the primary employer." But Congress did not conceive of the policy against secondary boycotts as "overriding" the policy of preserving primary pressure and it "is not for administrators of the Congressional mandate to approach the [preservation of primary pressure] side of [the] line grudgingly." *Local Lodge No. 112* v. *NLRB*, 362 U. S. 411, 417, n. 7. The same grudging

attitude toward primary pressure which accounts for the Board's reversal in *General Electric* (see reply brief for Petitioner in No. 321, p. 4), accounts for the new sweep of its orders.

The Board opposes exemption of primary picketing from secondary boycott orders on the ground that (Op. pp. 13, 11), "the line between lawful primary picketing and illegal secondary picketing is not susceptible of delineation by * * * objective criteri[a]". But drawing that line by objective criteria is exactly what the Board did in *Moore Dry Dock* and exactly what this Court, in *Denver*, 341 U. S. 657, 692, approved. If curtailment of picketing of the primary employer "is a consequence" of making subjective inferences as to "motive the test of legal wrong" (*NLRB* v. *Universal Camera Corp.*, 2 Cir., 179 F. 2d 749, 755, rev'd on other grounds, 340 U. S. 474), that is all the more reason why primary picketing must be distinguished from secondary picketing on objective grounds which are "described in advance" (Op. p. 11).

The assertion (Op. p. 9), that the ban upon primary picketing is limited to "a reasonable period of time" and is grounded in need "to dissipate the effects of the illegal activity" is entirely a figment of Board counsel's fertile imagination. Neither the limitation nor the theory was suggested to the court below nor does it find support in the terms of the order or in a single statement or implication in any Board or court decision. The Board itself said in this case (Pet. p. A-8), that its order was adopted not only "to remedy the unfair labor practice" but to "otherwise effectuate the policies of the Act." It is the Board's current view, as shown by the cases cited in the petition, p. 14, that those policies entail forfeiture of the right to

picket the primary employer for engaging in any secondary activity.

Chenery[2] aside, however, even as so confined and grounded, the prohibition of primary picketing could not survive. For the Board is not empowered to remedy unfair labor practices "by actually defeating the statutory rights of * * * employees" or by subjecting unions "to disabilities not intended by Congress * * *". *NLRB* v. *District 50, UMW*, 355 U. S. 453, 460, 463. Congress' enactment of the proviso to Section 8(b)(4)(i)(B), which assures that the right to engage in primary picketing shall under no circumstances be impaired, reinforces the plain implication of *Denver* and *Langer* (Pet. p. 13), that prohibition of primary picketing, even temporarily, is not one of the consequences which Congress authorized the Board to impose as a result of violation of Section 8(b)(4)(i)(B). Cf. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 73.

The Board does not deny that the question presented, affecting as it does every order in every common situs case, is of major national importance. The only defense the Board offers is its repudiation of the objective criteria approach of *Moore Dry Dock*. The claim of power to repudiate *Moore Dry Dock* despite this Court's approval underlies the Board's defense in *General Electric*. See Brief for the Board in No. 321, this term, p. 24, and reply brief for Petitioner, pp. 7-9. Rejection of the Board's defense in *General Electric* would destroy the predicate for its attempt (Op. pp. 12-13), to distinguish *McLeod* v. *Chefs, Cooks, Etc.*, 280 F. 2d 760, 47 LRRM 2541, and for its attempt to sustain the current construction of its orders.

[2] *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87-95.

For the foregoing reasons the petition for certiorari should be granted and the Board's order appropriately modified.

Respectfully submitted,

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